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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JULIE STOREY-GROSS et al., Plaintiffs and Respondents, v. KAREN KNIGHTON, Individually and as Trustee, etc., Defendant and Appellant.	G055774 (Super. Ct. No. 30-2015-00777776) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David L. Belz, Judge. Judgment affirmed with directions.

Karen Knighton, in pro. per., for Defendant and Appellant.

Charles K. Mills for Plaintiffs and Respondents.

* * *

In 1988, Virginia and Lloyd Gross created a Revocable Living Trust (the Trust), naming their four adult children as beneficiaries. In 2009, Virginia and Lloyd were diagnosed with dementia.[1] In 2012, Virginia died. Karen Knighton, an attorney and the Gross' granddaughter, became Lloyd's caretaker. Lloyd gave Knighton power of attorney and designated her as a cotrustee. Knighton was paid $220,000 per year, and Lloyd made her the beneficiary of five annuities worth $300,000.

In 2015, three of the Gross children (petitioners) filed a petition to compel an accounting. In 2016, Lloyd died. Petitioners then filed an amended petition. After a trial, the court found that Lloyd lacked mental capacity and Knighton exercised undue influence. The court voided the beneficiary changes and imposed surcharges ($540,000). The court credited Knighton for reasonable caretaker and legal services ($159,240), then doubled the damages due to Knighton's elder financial abuse.

On appeal, Knighton claims petitioners lacked standing, the trial court did not make "essential findings," and the court improperly imposed damages. We find no merit to these claims and affirm the judgment. We also direct the trial court to report Knighton to the State Bar of California if it has not already done so.

I

FACTS AND PROCEDURAL BACKGROUND

In 1988, Virginia and Lloyd created the Trust. The beneficiaries of the Trust were the couple's four adult children: Jean, Julie, Wayne, and Patricia (not a petitioner). Virginia and Lloyd were "astute" business people who bought, sold, and rented various real estate properties. Lloyd was particularly "frugal" in his business and private affairs. The couple's estate was worth about $3 million.

[1] As is customary in cases involving family members who share a last name, we will refer to the some of the family members in this case by their first names to avoid confusion.

In 2009, Virginia and Lloyd were both diagnosed with dementia. Virginia and Lloyd became progressively worse, but Virginia's dementia progressed more rapidly. In 2011, Virginia was placed in an assisted living nursing facility. In March 2012, Virginia passed away. Without notifying his children, Lloyd then married Marion, who also suffered from dementia.

In August of 2012, Knighton stopped working as an attorney in a law firm. Her salary had been $220,000 per year plus bonus. In September 2012, Knighton began doing legal and caretaking work for Marion and Lloyd.

In January 2013, Lloyd executed a power of attorney naming Knighton as his agent. Lloyd later agreed to pay Knighton a flat fee of $220,000 per year; there was no written retainer agreement.

In April 2014, Lloyd executed an amendment to the Trust naming Knighton as a cotrustee. In September, Lloyd signed forms naming Knighton as the primary beneficiary of five annuities worth $300,000. Knighton submitted a form to the annuity provider requesting a change of address from Lloyd's address to Knighton's home address. Lloyd's financial advisor, Carmello Buscemi, expressed concerns regarding undue influence. In December, Lloyd terminated Buscemi.

Relevant Proceedings

On March 18, 2015, petitioners filed a petition requesting an order compelling Knighton to "account for her activities" regarding the Trust and for her removal as a trustee. On February 24, 2016, Lloyd passed away. On June 9, 2016, petitioners filed an amended petition noting Lloyd's death.

On August 22, 2017, the court filed a statement of decision after a trial. The court imposed surcharges, gave a credit for Knighton's services, and imposed double damages. "[T]he testimony and evidence supports a finding that Lloyd Gross from October 2013 up until the time of his death on February 22, 2016 did not have sufficient

mental capacity to enter into a valid contract such as the flat fee arrangement for $220,000 agreed to in October 2013 and to make the change of primary beneficiary for five annuities executed on September 5, 2014 [$300,000]."

The court found: "Knighton's actions were the result of undue influence and excessive persuasion overcoming Lloyd's free will. The evidence supports a finding that Karen Knighton took unfair advantage of Lloyd as a result of his weakness of mind." Further, that: "Knighton . . . committed acts of adult financial elder abuse . . . . The court therefore awards double damages . . . . The court calculates the double damages after applying a credit for the work that Karen performed . . . ."

II

DISCUSSION

Knighton contends: A) petitioners lacked standing; B) the trial court failed to make "essential findings" regarding Lloyd's mental capacity and Knighton's exercise of undue influence; and C) the court erred in imposing damages.

A. Standing

Knighton argues that while Lloyd was alive respondents lacked standing to bring claims for an accounting of the Trust, for elder abuse, and for the return of the annuities. We disagree.

"'Standing' is a party's right to make a legal claim and is a threshold issue to be resolved before reaching the merits of an action." (*Said v. Jegan* (2007) 146 Cal.App.4th 1375, 1382.) Generally, standing is a question of law to which we apply a de novo standard of review. (*Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 548-549.) However, where the issues turn on questions of fact, we review the trial court's findings for substantial evidence. (*Ibid.*)

In an inter vivos trust, "before a settlor's death (*and in the absence of a showing of incompetence*), a contingent beneficiary lacks standing to petition the probate court to compel a trustee to account or provide information relating to the revocable trust." (*Babbitt v. Superior Court* (2016) 246 Cal.App.4th 1135, 1144, italics added.) However, "after a settlor dies . . . [Probate Code] section 17200 gives a contingent beneficiary standing to petition the probate court for an accounting of assets."[2] (*Ibid*.) "Standing, for purposes of the Elder Abuse Act, must be analyzed in a manner that induces interested persons to report elder abuse and to file lawsuits against elder abuse and neglect." (*Estate of Lowrie* (2004) 118 Cal.App.4th 220, 230.) The "personal representative or any interested person" may file a petition requesting that the court make an order in an elder abuse case. (§ 850, subds. (a)(2)(C) & (D).)

On March 18, 2015, petitioners (contingent beneficiaries) filed a petition for an order to compel an accounting, for the production of information, and to remove Knighton as a trustee of the Trust (then revocable). Under the heading of "STANDING" the petition averred that Lloyd "has been found to be incapacitated by a licensed . . . physician." The petition included a letter from Lloyd's physician, Dr. Bruno Bucci, stating that Lloyd was mentally incapacitated.

On June 9, 2016, petitioners filed an amended petition by stipulation. Under the heading of "STANDING" the amended petition noted that Lloyd had passed away on February 24, 2016. Further, that: "Upon the passing of Mr. and Mrs. Gross, the trust became irrevocable."

Although the trial court did not explicitly rule on the question of standing, the court impliedly ruled that petitioners had standing because the court presided over the relevant proceedings and ruled on the merits of petitioners' claims. (See *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 880 [implied ruling by

[2] Further undesignated statutory references are to the Probate Code.

trial court regarding intervener standing].) In the initial petition, petitioners made the requisite showing that Lloyd had been found incompetent by his doctor. And by the time of the amended petition, petitioners noted that Lloyd had died. As far as the remaining elder abuse claims, petitioners were "interested persons" under the relevant statutes. Thus, we affirm the trial court's implied rulings regarding standing.

Knighton cites *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-233 (*Mervyn's*) for the proposition: "'[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.'" While we agree that this is a well-settled principle of law, the *Mervyn's* case is not on point. In *Mervyn's*, the plaintiff was a nonprofit corporation that sued a department store chain for unfair competition. (*Id*. at p. 227.) During the proceedings, there was a change in the unfair competition law, and as a result, the nonprofit organization lost its standing. The Court concluded: "For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Id*. at pp. 232-233.)

Here, like the plaintiffs in *Mervyn's*, petitioners had standing to make their legal claims when they filed their pleadings. But unlike the situation in *Mervyn's*, there has been no change in the law—or the facts—that has resulted in petitioners losing standing at any point during the proceedings.

B. Lloyd's Mental Capacity and Knighton's Undue Influence

Knighton argues the trial court "failed to make essential findings" as to Lloyd's lack of mental capacity and Knighton's exercise of undue influence. We are not certain what Knighton means by "essential findings." We find substantial evidence to support the court's factual findings.

"Where a statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts

will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1577.) "The testimony of a single credible witness may constitute substantial evidence." (*City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 396.)

When conducting a substantial evidence review, we view the whole record in a light most favorable to the judgment, we resolve all evidentiary conflicts in favor of the decision, and we draw all reasonable inferences in favor thereof. (*CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 787.) "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)[3]

1. Lloyd's Mental Capacity

There is a rebuttable presumption "'that all persons have the capacity to make decisions and to be responsible for their acts or decisions.'" (*Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 545.) "[A] determination that a person lacks the capacity to execute a trust must be supported by evidence of a deficit in at least one of specified mental functions that 'by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate

[3] Knighton acknowledges that a finding of undue influence is reviewed under the substantial evidence standard. But without citation to authority, Knighton contends that a trial court's finding regarding capacity is reviewed for an abuse of discretion. She is mistaken. (See *Estate of Collin* (1957) 150 Cal.App.2d 702 [finding by trial judge that testator lacked testamentary capacity will not be disturbed on appeal when supported by substantial evidence].)

the consequences of his or her actions with regard to the type of act or decision in question.'" (*Ibid.*)

The specified mental deficits include problems with alertness and attention (such as orientation to time and place, and ability to concentrate), information processing (such as memory, communication, recognition of familiar persons), thought processes (such as disorganized thinking, hallucinations, and delusions). (§ 811, subd. (a).)

Here, Lloyd's son testified that Lloyd had told him in 2009 that he had been "diagnosed with dementia." He testified that starting in 2010, Lloyd started to become "incapacitated" and was "starting to lose [his] ability to manage his property in Las Vegas." The son testified that in 2013, Lloyd's cognitive abilities became noticeably worse. Lloyd "just couldn't remember anything, short-term memory was very poor at that time, names, couldn't remember names all the time, he was starting to, you know, not [able to] recognize people that he knew all the time, it -- just dementia."

Lloyd's son testified that while Lloyd had formerly been frugal, starting in 2013, Lloyd had problems comprehending the value of money: "If I gave him a $10 or $100 bill he wouldn't know what would buy what. He may think that he would need to use the $100 bill to pay for lunch." One of Lloyd's daughters testified that Lloyd called her in 2012, prior to going out for dinner. Lloyd said, "'Instead of using a credit card, I am going to go to the bank. How much do you think I should withdraw from the bank? [$]2,000? $3,000? Will that be enough to pay for dinner for us?'" She said that Lloyd "didn't have a clue about money anymore, by 2012."

Dr. Bucci testified that he was board certified in family practice, which involved treating elderly people with dementia. Dr. Bucci testified that he began treating Lloyd in July 2011, when Lloyd was 79 years old. Dr. Bucci said that Lloyd was on several medications for "multiple medical problems" including: "hypertension, diabetes, chronic obstructive pulmonary disease, high blood pressure." Dr. Bucci concluded in October 2012 that Lloyd's "dementia was getting worse."

Here, the testimony of Lloyd's children and Dr. Bucci constitutes substantial evidence to support the trial court's finding that Lloyd "from October 2013 up until the time of his death on February 22, 2016 did not have sufficient mental capacity to enter into a valid contract" concerning Knighton's $220,000 annual salary, and to change the annuities to make her the primary beneficiary ($300,000). The evidence of Lloyd's distorted thought processes regarding the relative value of money was particularly supportive of the court's factual findings.

Knighton argues at length about other evidence in the record that would tend to support a contrary finding (primarily her own testimony). But it is not our task to reweigh the evidence or to judge the credibility of witnesses. Having found substantial evidence, we affirm the trial court's finding regarding Lloyd's lack of competence.

2. Knighton's Undue Influence

Generally, people may dispose of their property as they see fit without regard to whether the dispositions are appropriate or fair; "Testamentary competence is presumed." (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604.) However, the presumption can be overcome and a testamentary document may be set aside if it was procured by undue influence. (*Rice v. Clark* (2002) 28 Cal.4th 89, 96-97.) "Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency." (*Id.* at p. 96.) The doctrine applies to any testamentary document, including an inter vivos trust. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.)

The presumption of competence is overcome and a rebuttable presumption of undue influence arises if the challenger shows the person who allegedly exerted undue influence (1) had a confidential relationship with the testator; (2) actively participated in preparing or executing the trust in a nonincidental fashion; and (3) accrued undue profit by virtue of the trust. (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.) If this

presumption is activated, the proponent of the trust has the burden of proving by a preponderance of the evidence that the document was not procured by undue influence. (*Estate of Stephens* (2002) 28 Cal.4th 665, 677.)

"'Undue influence' means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered: [¶] (1) The vulnerability of the victim. Evidence of vulnerability may include . . . incapacity, illness, disability . . . age . . . impaired cognitive function . . . and whether the influencer knew or should have known of the alleged victim's vulnerability. [¶] (2) The influencer's apparent authority. Evidence of apparent authority may include . . . status as a fiduciary, family member, care provider . . . legal professional . . . . [¶] (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include. . . : [¶] . . . [¶] (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes . . . . [¶] (4) The equity of the result. Evidence of the equity of the result may include . . . the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing . . . ." (Welf. & Inst. Code, § 15610.70, subd. (a).)

Here, the trial court found that Knighton "exercised undue influence over Lloyd Gross at a time when he was vulnerable as a result of cognitive deficits related to dementia." The court supported its finding of undue influence by citing to circumstantial evidence in the record, including that "Knighton had a confidential relationship with Lloyd, that she was a fiduciary as of the time that she drafted and had Lloyd sign the Power of Attorney in January 2013. She actively participated in the change of Trustee in September 2014 and unduly profited from the flat fee contract [$220,000 per year] and the change of primary beneficiary for the annuities [$300,000]."

Having found a presumption of undue influence, the court cited to circumstantial evidence supporting its finding that Knighton did not overcome the

presumption, including: 1) prior to his diagnosis of dementia in 2009, Lloyd was known as a frugal person and an astute manager of his various investments; 2) the drafting of the power of attorney was done in secrecy with no notice to Lloyd's children; 3) Knighton had apparent authority as Lloyd's grandchild and caretaker, as well as her status as a licensed attorney; 4) the flat fee contract of $220,000 per year was excessive for the types of legal services provided; 5) the nature of the flat fee contract itself indicated that Lloyd's dementia had progressed to the point where he was no longer able to understand the nature of the decisions he was making; 6) Knighton secretly initiated the transfer of Lloyd's assets ($300,000) without the knowledge of Lloyd's children; and 7) the transfer was so suspicious that it caused Lloyd's financial adviser to notify his legal department.

There is substantial evidence of Lloyd's vulnerability, Knighton's apparent authority, inequity of the results, and divergence from Lloyd's prior course of conduct. In short, the trial court's finding of Knighton's undue influence is well supported.

Knighton again argues at length about other evidence in the record that would tend toward a contrary finding, but it is not our role to resolve such factual conflicts on appeal. Thus, we affirm the trial court's finding of undue influence.

C. Damages

Knighton argues that the trial court erred by: 1) imposing surcharges; 2) by offsetting those surcharges for caretaking and legal services; and 3) by doubling the damages due to financial elder abuse. We disagree.

"If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust . . . . [¶] 2) Any profit made by the trustee through the breach of trust . . . ." (§ 16440, subd. (a)(1), (2).) "The provisions in this article for liability of a trustee for breach of trust do not prevent resort to any other remedy available under the statutory or common law." (§ 16442.)

A trial court has wide discretion to make any order and take any action necessary or proper to dispose of matters presented by a petition under section 17200. (§ 17206.) When a court surcharges a trustee we review that determination under an abuse of discretion standard. "Judicial discretion" is "the sound judgment of the court, to be exercised according to the rules of law." (*Lent v. Tillson* (1887) 72 Cal. 404, 422.) An abuse of discretion "'implies . . . arbitrary determination, capricious disposition or whimsical thinking.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85.)

1. Surcharges

A "surcharge" is a penalty for failure of a trustee to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 268-274.) Trustees must "prove every item of their account by 'satisfactory evidence'; the burden of proof is on them and not on the beneficiary; and any doubt arising from their failure to keep proper records, or from the nature of the proof they produce, must be resolved against them." (*Estate of McCabe* (1950) 98 Cal.App.2d 503, 505.)

Here, Lloyd paid Knighton $220,000 in 2013, plus quarterly payments of $285,000 in 2014, for a total of $505,000. In addition, the Trust paid a law firm an additional $35,000 to provide Knighton with legal services in her capacity as a trustee. Because Knighton breached her fiduciary duties, the court imposed total surcharges of $540,000. Given the court's findings of Lloyd's lack of mental capacity and Knighton's undue influence, we find no abuse of the court's discretion.

Knighton argues that she increased the Trust's assets through tax savings and other services she performed as a trustee. The court did not credit Knighton for these savings. While other courts may have done so, we do not think that the court's ruling was outside the bounds of reason given its finding of undue influence. Thus, we find no abuse of the trial court's discretion regarding surcharges.

2. Legal and Caretaking Services

"'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court . . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services . . . without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.'" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) Generally, a legal services contract over $1,000 must be in writing. (Bus. & Prof. Code, § 6148.)

Here, Knighton testified that from April 2013 to May 2015, she worked approximately 3,792 hours providing both caretaker and legal services. Knighton largely did not contemporaneously itemize the work that she performed. The trial court found that Knighton spent a "limited amount of time" working on legal matters. Therefore, the court compensated Knighton for 379 hours (10%) of legal work at $150 per hour, and 3,413 hours (90%) of caretaking work at $30 per hour for a total credit of $159,240. Given that there was no written retainer agreement, and Knighton did not provide contemporaneous detailed billing, we find that the court fairly considered the relevant testimony and awarded Knighton a reasonable amount for her services. Indeed, other courts may have reasonably declined to do so given the finding of undue influence.

Knighton argues that "the stipulated hours were broken out specifically for the categories of work performed." But Knighton has provided no citation to a specific document to support this claim. (See *Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 694-695 ["'appellant must present . . . citations to facts in the record that support the claim of error'"].) There is a stipulation in the record that: "Exhibit No. 24 may be considered by the court as [Knighton's] direct testimony

regarding the time that she spent." Exhibit No. 24 is not part of the record on appeal, but it is apparent that the parties stipulated to *the existence of the document*, not the truth of its contents. In any event, given the findings of Lloyd's lack of competence and Knighton's undue influence, the court was well within its discretion to set the amount of her compensation. (§ 17206, subd. (b).)

3. Financial Elder Abuse Damages

"'Financial abuse' of an elder . . . adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud, or both. [¶] . . . [¶] (3) Takes, secretes, appropriates, obtains, or retains . . . real or personal property of an elder . . . by *undue influence* . . . ." (Welf. & Inst. Code, § 15610.30, subd. (a), italics added.) "For purposes of this section, 'representative' means a person . . . that is either of the following: [¶] (1) A conservator, trustee, or other representative of the estate of an elder . . . . [¶] (2) An attorney-in-fact of an elder . . . who acts within the authority of the power of attorney." (Welf. & Inst. Code, § 15610.30, subd. (d).)

"If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of *undue influence in bad faith* or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part." (§ 859, italics added.)

Here, the trial court found that Knighton "has in *bad faith wrongfully taken by use of undue influence* the property of Lloyd" and therefore "committed acts of adult financial elder abuse pursuant to W&I 15610.30. The court therefore awards double damages as required in PC 859 against Karen Knighton." (Italics added.) As previously

discussed, the court's factual findings are supported by substantial evidence. Therefore, we affirm the court's statutorily required award of double damages.

"Within 20 days after a judgment by a court of this state that a licensee of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, *the court which rendered the judgment* shall report that fact in writing to the State Bar of California." (Bus. & Prof. Code, § 6086.8, subd. (a), italics added.)

We assume the trial court complied with Business and Professions Code section 6086.8, subdivision (a). However, there is nothing in the record confirming this fact. Thus, out of an abundance of caution, we direct the trial court to comply with its reporting obligations, if it has not already done so.

III

DISPOSITION

Judgment affirmed. The trial court is directed to comply with its reporting obligations under Business and Professions Code section 6086.8, subdivision (a), if it has not already done so. Costs on appeal are awarded to respondents.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.